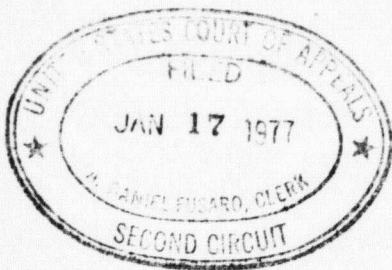


***United States Court of Appeals
for the Second Circuit***



APPENDIX



ORIGINAL

76-7564

United States Court of Appeals

For the Second Circuit.

ALBERT L. BAILEY, Jr., and BARBARA J. BAILEY,
Plaintiffs-Appellants,
against

HARTFORD FIRE INSURANCE CO.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

MAX ANDER
Attorney for Plaintiffs-Appellants
565 Fifth Avenue
New York, N. Y. 10017
OX 7-9150

GREENHILL & SPEYER
Attorneys for Defendant-Appellee
56 Pine Street
New York, N. Y. 10005
943-1550

B
P/S

PAGINATION AS IN ORIGINAL COPY

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1a

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

-----X

ALBERT L. BAILEY, JR. and BARBARA J. BAILEY,

Plaintiffs-Appellants,

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant-Appellee.

-----X

DOCKET ENTRIES.

Date	Proceedings
1976	
4-28	Petition for removal and bond for removal filed (Sup Ct/Richmond).
4-28	Notice of filing of petition for removal filed.
4-28	ANSWER filed.
5-4	Pltff;s demand for jury filed.
6-16	BEFORE DOOLING, J. - civil cause pre-trial conference - status of case discussed - conference memorandum will be forthcoming
6-23	By DOOLING, J. - Conf memo and order setting trial for 10-4-76 etc., filed.
8-3	Notice of motion ret. 8-30-76 with memo of law for summary judgment filed.

DOCKET ENTRIES

Date	Proceedings
1976	
8-26	Affidavit in opposition to motion for summary judgment filed. with memo of law.
9-14	Reply affidavit in support of motion for summary judgment filed. with memo of law.
9-15	Letter dtd. 9-3-76 from Grunhill & Speyer to Judge Dooling filed.
9-20	Letter dtd 9-16-76 to J. Dooling from Max Ander re sur-rebuttal.
9-27	Sur-rebuttal reply memo on behalf of pltffs filed.
10-29	By DOOLING J.-Memo & Order dtd 10-29-76 granting deft's motion for summary judgment and directing the Clerk to enter judgment dismissing the complaint filed.
11-1	JUDGMENT dtd 10-29-76 that deft's motion for summary judgment is granted and the action is dismissed with costs filed.
11-17	Notice of appeal of pltffs filed.
11-23	\$250.00 deposited in Registry by Pltff's atty in lieu of bond on appeal.

DEFENDANT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs,

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant.
-----X

INDEX NO. 76 C 765
(J.F.D.)

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

S I R:

PLEASE TAKE NOTICE that defendant moves the court, pursuant to Rule 56 FRCP for an order of summary judgment dismissing the complaint herein, based upon the affidavits of James Healy and John M. Speyer.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on before Hon. John F. Dooling, Jr. at the United States Courthouse, Cadman Plaza, Brooklyn, New York, on August 30, 1976 at 10:00 A.M., or as soon thereafter as counsel can be heard.

Dated: New York, N. Y.
August 2, 1976

Yours, etc.,

GREENHILL & SPEYER
Attorneys for Defendant

By 

A member of the firm

Office & P. O. Address
56 Pine Street
New York, N. Y. 10005
(212) 943-1550

TO: MAX ANDER, ESQ.
Attorney for Plaintiffs
565 Fifth Avenue
New York, N. Y. 10017

STATEMENT PURSUANT TO RULE 9(G).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
:
ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs,

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant.

: Index No. 76 C 765

: (J.F.D.)

:
: STATEMENT OF MATERIAL FACTS
: PURSUANT TO RULE 9(G)
:
-----x

1. Defendant issued a home owners insurance policy No. 17-RA-648578 to plaintiff covering premises at 26 Harbor View Court, Staten Island, New York. The relevant portion of the policy is contained in Exhibit "A" to the affidavit of James Healy. The policy was in effect on July 13, 1975.

2. This suit is to recover under the policy for damages sustained when plaintiffs' retaining wall collapsed on July 13, 1975.

3. Said retaining wall was located 5' behind the insured dwelling and was approximately 90' long, 9' high and 1' thick of concrete construction. Its condition several months after the occurrence is represented by photographs, Exhibits "B-1", "B-2" and "B-3", attached to the affidavit of James Healy.

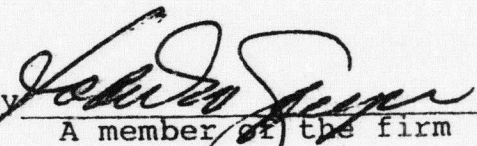
4. The only damages sustained to the premises were several large vertical cracks in the rear wall. The New York City Department of buildings issued a violation against the premises, and ordered the insured to vacate and to shore up the building and to replace the

STATEMENT PURSUANT TO RULE 9(G)

retaining wall. No repairs have been made to the retaining wall or the building to the present date.

5. Plaintiffs retained Daniel J. O'Connell, consulting engineer, who inspected the premises on October 1, 1975 and issued a report concerning the cause of the occurrence which is attached to the affidavit of John M. Speyer as Exhibit "A". The conclusions of that report, as to the cause of the accident, are accepted by the defendant for the purposes of this motion only.

GREENHILL & SPEYER
Attorneys for Defendant

By 
A member of the firm

Office & P. O. Address
56 Pine Street
New York, N. Y. 10005
(212) 943-1550

6a

AFFIDAVIT OF JOHN M. SPEYER IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x	:	Index No. 76 C 765
ALBERT L. BAILEY, JR. and	:	
BARBARA J. BAILEY,	:	
Plaintiffs,	:	
-against-	:	<u>AFFIDAVIT IN SUPPORT OF</u> <u>MOTION FOR SUMMARY JUDGMENT</u>
HARTFORD FIRE INSURANCE CO.,	:	
Defendant.	:	
-----x	:	

STATE OF NEW YORK)
) SS. :
COUNTY OF NEW YORK)

JOHN M. SPEYER, being duly sworn, deposes and says that I am one of the attorneys for the defendant herein and am familiar with the facts set forth below, and make this affidavit in support of defendant's motion for summary judgment.

1. On or about September 3, 1975 we received the defendant's file in this matter for review. We caused a further inspection of the premises to be made and additional photographs to be taken.

2. On October 30, 1975 we conducted an examination under oath of the plaintiff Albert L. Bailey, pursuant to the policy terms. In connection with this examination we demanded, and plaintiff furnished, a copy of the report dated November 17, 1975 of his consultant engineer

AFFIDAVIT OF JOHN M. SPEYER IN SUPPORT OF MOTION

Daniel J. O'Connell who had examined the premises on October 1, 1975 and furnished his opinion concerning cause (copy attached, Exhibit "A").

3. Although the engineer retained by the defendant reached a somewhat different conclusion, for the purposes of this motion we will accept the conclusions of plaintiff's expert.

4. Suit was commenced on or about March 3, 1976 (copy of complaint attached, Exhibit "B"). It was removed to this court on the basis of diversity of jurisdiction. The answer (copy attached, Exhibit "C") alleges the defenses which are relied upon on this motion.

5. The essential facts are not in dispute. The retaining wall collapsed. The building did not collapse; it merely suffered several cracks. Even if the building had collapsed the cause would have been earth movement and shifting, and water beneath the surface of the ground.

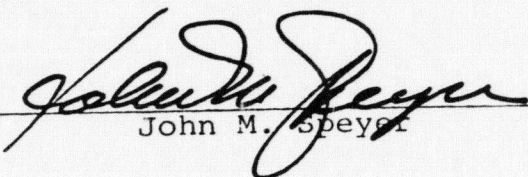
6. The terms of the policy are also not in dispute. It does not cover damage to retaining walls. It does not cover settling or cracking (only collapse). It excludes in any event losses caused or contributed to by earth movement or shifting and water beneath the surface of the ground.

7. Thus it is clear that there are no issues of fact to be determined. The policy is clear and unambiguous and has been construed in numerous previous cases. It precludes recovery for a loss of this nature and defendant is entitled to summary judgment.

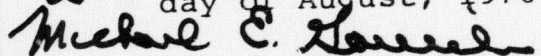
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AFFIDAVIT OF JOHN M. SPEYER IN SUPPORT OF MOTION

WHEREFORE, it is respectfully requested that defendant's motion for summary judgment be granted and the complaint dismissed.


John M. Speyer

Sworn to before me this

2nd day of August, 1976


MICHAEL E. GORELICK
Notary Public, New York
No. 24-124-4, Qual. in Kings Co.
Certificate issued by New York County
Commission expires March 30, 1978

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER.
DANIEL J. O'CONNELL P. E.

CONSULTING ENGINEER
51 EAST 42ND STREET
NEW YORK, N. Y. 10017

MURRAY HILL 2-6180

November 17 1975

Max Ander, Esq.
Counselor at Law
565 5th Ave.
New York NY 10017

Dear Sir:

RE: Structural Damage
26 Harbor View Court
Staten Island N.Y.

In accordance with your request, I examined the collapsed retaining wall and its retained soil, and also the foundation walls and superstructure of the residence at 26 Harbor View Court in Staten Island, N.Y. The examination was conducted on 10/1/75 in order to determine the cause of the sudden collapse of the retaining wall and the effect on the stability and structural condition of the foundation of the 2-story and attic framed residence at 26 Harbor View Court.

Examination of the retaining wall, which collapsed on 6/13/75, revealed that it was 80 ft. long, 9'2" high and 1'2" thick. The wall was constructed with plain unreinforced concrete with a compressive strength of approximately 2500 lbs. per sq. in. Examination also revealed that 60 ft. of the wall collapsed, leaving 20 ft. standing at its easterly end.

The easterly half of the wall runs parallel to the back foundation wall of the framed dwelling and was just 5 ft. away. Thus, the retaining wall provided necessary lateral stability for the foundation wall.

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

The collapse of the retaining wall thus removed the preexisting lateral support of the foundation wall and the earth on which it rests. The loss of lateral support has rendered the rear foundation wall dangerous and totally unfit for its intended use to support the 2-story and attic dwelling.

The structural stability of the dwelling has been seriously impaired, and complete collapse on to the adjacent property below will occur when the supporting soil is eroded away sufficiently. Indeed, partial collapse of the dwelling has already occurred. The foundation wall has cracked, and 2 large vertical cracks are widening due to the loss of its lateral support.

Thus, the rear wall of the dwelling must be properly shored up immediately to prevent total and irreparable collapse.

Sedimentation analysis of the retained soil revealed that it consists of 60% fine sand and 40% silt and clay. Such soil is relatively impermeable and absorbs and holds water within its pores. Thus, free water does not build up behind the wall; but remains in the soil and imparts cohesive strength to the soil, so that the earth bank can stand vertically without any support. Photographs of the area show the soil bank still standing vertically 3 months after the wall collapsed.

However, the trapped pore water causes the silt and clay soil to expand or contract as the amount varies. As the soil absorbs water, it expands, and as it dries, it contracts, and can become stone like in hardness when very dry.

The cause of the collapse of the retaining wall was the

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

expansion of the retained soil as it absorbed water. The expansion of the soil produced greatly increased pressure against the retaining wall. The lateral pressure gradually increased until the wall could no longer resist the overturning effect of the lateral pressure and collapsed.

It is important to note that the wall did not tip over about its footing, but rather broke in bending along a plane approximately 2 ft. above the ground below. Thus, the increased pressure due to the expansion of the retained soil caused the wall to bend and then crack and break.

After the wall failed the retained soil did not fall but remained standing. The collapse allowed the soil to expand to its normal condition, and its cohesive strength maintained the soil bank in a vertical position and prevented horizontal sliding and vertical subsidence.

The collapse of the wall was not due to so called hydro static pressure due to flowing or impounded free water behind the wall, but solely to the pressure due to expansion of the silt and clay contained in the soil.

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

CONCLUSIONS:

1. The retaining wall collapsed because of greatly increased lateral pressure produced by the expansion of the silt and clay of the retained soil.
2. The expansion of the soil was caused by the absorption of static water trapped in the pores of the silt and clay.
3. The soil bank did not fall, but remained standing after the wall collapsed.
4. The wall was not subjected to pressure from flowing or free standing water impounded behind the wall.
5. The collapse of the retaining wall removed the pre-existing lateral support of the rear foundation wall of the 2-story dwelling, and has caused its partial collapse.
6. The loss of lateral support of the rear foundation wall has rendered it dangerous and totally unfit for its intended use.
7. The rear wall will surely collapse when the laterally unsupported soil on which it rests erodes sufficiently.
8. The rear wall must be properly shored up immediately to prevent collapse and irreparable damage to the dwelling.

Respectfully submitted.

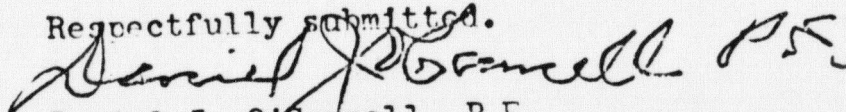

Daniel J. O'Connell, P.E.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER.

RECEIVED

APR 8 1976

GREENHILL & SPEYER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
----- XALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs,

COMPLAINT

-against-

HARTFORD FIRE INSURANCE COMPANY,

Defendant
----- X

Plaintiffs, for their verified complaint herein, by L. M.

ANDER, their attorney, allege:

1. That at all the times hereinafter mentioned, plaintiffs were and still are residents of the County of Richmond, State of New York.

2. Upon information and belief, that at all the times hereinafter mentioned, defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and duly authorized to carry on its business of fire and indemnity insurance in the State of New York and had due legal authority and corporate capacity to make the contract of insurance hereinafter set forth.

3. That at all the times hereinafter mentioned, plaintiffs were and still are the owners in fee of certain premises known as 26 Harbor View Court, Staten Island, New York, and of the building and other structures thereon erected and appurtenant thereto.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

4. That heretofore and prior to July 13, 1975, defendant, in consideration of premium payments paid to it by plaintiffs, duly made, executed and delivered to plaintiffs a certain policy bearing No. 17-RA-648578 wherein and whereby, among other things, it duly insured plaintiffs against damage to their said building including appurtenant structures, unscheduled personal property, additional living expenses and/or property damage caused by, among other things, the collapse of said building and other structures appurtenant thereto at said premises, in whole or in part, and with respect to material impairment of the basic structure or substantial integrity of the building and other structures described above.

5. That said policy of insurance covered a period from July 12, 1974 to July 12, 1977.

6. That on or about the 13th day of July, 1975, in the period covered by said policy of insurance, said building and other structures hereinabove described, were damaged and collapsed in whole or in part.

7. That plaintiffs gave to defendant immediate notice of said occurrence and damage.

8. That plaintiffs have duly performed all of the conditions of said policy of insurance on their part to be performed.

9. That the defendant has not, since the time of said loss, made payment as required under the terms of the policy.

10. That this action was commenced within 12 months next after the inception of said loss.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

WHEREFORE, plaintiffs demand judgment against the defendant in the sum of \$100,000 with interest thereon from July 13, 1975, together with the costs and disbursements of this action.

MAX ANDER
Attorney for Plaintiffs
Office & P O Address
565 Fifth Avenue
Borough of Manhattan
City of New York

EXHIBIT C, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X

ALBERT L. BAILEY, JR. and BARBARA :
J. BAILEY, :

Plaintiffs :

- against - :

HARTFORD FIRE INSURANCE COMPANY, :

Defendant. :

- - - - -X

ANSWER

Defendant, Hartford Fire Insurance Company, by Greenhill & Speyer, its attorneys, answering the complaint herein, respectfully alleges upon information and belief:

1. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs marked "1", "3", "6" and "8" of the complaint.

2. Denies each and every allegation set forth in paragraphs marked "4" and "5" of the complaint herein, except admits that defendant issued its policy no. 17-RA648578, and as to its terms and conditions begs leave to refer to the original policy when same is produced by the plaintiffs at the trial of the action.

3. Denies each and every allegation set forth in paragraph marked "9" of the complaint, except admits non-payment.

EXHIBIT C, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT ALLEGES UPON INFORMATION AND
BELIEF AS FOLLOWS:

4. That the policy sued upon provided, among other terms and conditions that:

"PERILS INSURED AGAINST

"This policy insures against direct loss to the property covered by the following perils as defined and limited herein...

"14. Collapse of buildings or any part thereof, but excluding loss to outdoor equipment, awnings, fences, pavements, patios, swimming pools, underground pipes, flues, drains, cesspools and septic tanks, foundations, retaining walls, bulkheads, piers, wharves, or docks, all except as the direct result of the collapse of a building... Collapse does not include settling, cracking, shrinkage, bulging or expansion.

* * *

"This policy does not insure against loss:

"2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting...

"3. caused by, resulting from, contributed to or aggravated by any of the following:

"c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors."

EXHIBIT C, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

5. That the loss alleged in the complaint was a loss to "foundations, retaining walls" which are excluded under the terms of the policy, and therefore defendant is not liable to plaintiffs in any manner whatsoever or in any amount.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT ALLEGES UPON INFORMATION AND
BELIEF AS FOLLOWS:

6. Defendant repeats, reiterates and realleges each and every allegation set forth in paragraph "4" of this answer as if fully set forth at length herein.

7. That the alleged loss occurred from "settling, cracking, shrinkage, bulging or expansion" which are not covered by the policy and therefore defendant is not liable to plaintiffs in any manner whatsoever or in any amount.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE
DEFENDANT ALLEGES UPON INFORMATION AND
BELIEF AS FOLLOWS:

8. Defendant repeats, reiterates and realleges each and every allegation set forth in paragraph "4" of this answer as if fully set forth at length herein.

9. That the alleged loss was "caused by, resulting from, contributed to or aggravated by ...earth movement, including but

EXHIBIT C, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

not limited to... landslide, mudflow, earth sinking, rising or shifting" which is not insured under the policy and, therefore, defendant is not liable to plaintiffs in any manner whatsoever or in any amount.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
DEFENDANT ALLEGES UPON INFORMATION AND
BELIEF AS FOLLOWS:

10. Defendant repeats, reiterates and realleges each and every allegation set forth in paragraph "4" of this answer as if fully set forth at length herein.

11. That the alleged loss was "caused by, resulting from, contributed to or aggravated by ... water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls ... or through ... any other openings in such sidewalks, driveways, foundations, walls" which are not insured under the policy and, therefore, defendant is not liable to plaintiffs in any manner or in any amount.

WHEREFORE, defendant demands judgment dismissing the

EXHIBIT C, ANNEXED TO AFFIDAVIT OF JOHN M. SPEYER

complaint with costs and disbursements of this action.

Dated: New York, N. Y.
April 27, 1976

Yours, etc.

GREENHILL & SPEYER

BY: _____
John M. Speyer

Attorneys for Defendant
Office and P.O. Address
56 Pine Street
New York, N. Y. 10005
(212) 943-1550

TO: MAX ANDER, ESQUIRE
Attorney for Plaintiffs
Office and P.O. Address
565 Fifth Avenue
New York, n. Y. 10017

AFFIDAVIT OF JAMES HEALY IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x	:	Index No. 76 C 765
ALBERT L. BAILEY, JR. and	:	
BARBARA J. BAILEY,	:	
Plaintiffs,	:	AFFIDAVIT IN SUPPORT OF
-against-	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
HARTFORD FIRE INSURANCE CO.,	:	
Defendant.	:	
-----x	:	

STATE OF NEW YORK)
) SS. :
COUNTY OF NEW YORK)

JAMES HEALY, being duly sworn, deposes and says:

1. I am resident assistant secretary of Hartford Fire Insurance Company and am familiar with the company's file concerning this claim. I submit this affidavit in support of the defendant's motion for summary judgment.

2. Hartford Fire Insurance Co. issued a home owners policy of insurance to plaintiffs on residence at 26 Harbor View Court, Staten Island, N. Y. which was in effect on July 13, 1975. The policy covered certain specified perils, and also contained various relevant definitions and exclusions to coverage (copy of home owners policy, broad form, pages 1 and 2 is attached as Exhibit "A").

3. On July 14, 1975 the company was notified by plaintiff of the collapse, on July 13, 1975, of a retaining wall located behind his house.


AFFIDAVIT OF JAMES HEALY IN SUPPORT OF MOTION

4. Our investigation disclosed that this retaining wall was located approximately 5' behind the insured's house, and was 90' in length, 9' high and 1' thick, of concrete construction. Several photographs (Exhibit "B-1", "B-2" and "B-3") of a portion of the collapsed retaining wall were taken several months later on or about September 2, 1975 and are attached to assist the court.

5. The building itself did not collapse. Apparently, however, the New York City Department of Buildings some time thereafter issued a violation against the premises and ordered the insured to vacate and shore up the building, and replace the retaining wall. As far as we know the plaintiffs have taken no steps to replace the retaining wall or shore up the building in the year since the occurrence.

6. The insureds' claim was not paid since it was not covered under the policy of insurance.

7. I am advised by our attorneys that, under the circumstances, the defendant is entitled to summary judgment dismissing the complaint.


James Healy

Sworn to before me this

day of August, 1976

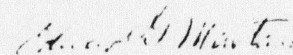

EDWARD G. MARTANO
Notary Public, State of New York
No. 123456
Qualified to take oaths
Commission Expires March 30, 1977

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JAMES HEALY.

NOTAL
SUBA BY INSD

HOMEOWNERS POLICY — BROAD FORM

SECTION I

(For use in Bronx, Kings, Nassau, New York, Putnam, Queens, Richmond,
Rockland, Suffolk and Westchester Counties)HO-2
(Ed. 9-70)
-T-

DESCRIPTION OF PROPERTY AND INTERESTS COVERED

COVERAGE A — DWELLING

This policy covers the described dwelling building, including additions in contact therewith, occupied principally as a private residence.

This coverage also includes:

1. if the property of the Insured and when not otherwise covered, building equipment, fixtures and outdoor equipment all pertaining to the service of the premises and while located thereon or temporarily elsewhere; and
2. materials and supplies located on the premises or adjacent thereto, intended for use in construction, alteration or repair of such dwelling.

COVERAGE B — APPURTENANT STRUCTURES

This policy covers structures (other than the described dwelling building, including additions in contact therewith) appertaining to the premises and located thereon.

This coverage also includes materials and supplies located on the premises or adjacent thereto, intended for use in construction, alteration or repair of such structures.

This coverage excludes:

1. structures used in whole or in part for business purposes; or
2. structures rented or leased in whole or in part or held for such rental or lease (except structures used exclusively for private garage purposes) to other than a tenant of the described dwelling.

COVERAGE C — UNSCHEDULED PERSONAL PROPERTY

This policy covers unscheduled personal property usual or incidental to the occupancy of the premises as a dwelling and owned or used by an Insured, while on the described premises and, at the option of the Named Insured, owned by others while on the portion of the premises occupied exclusively by the Insured.

This coverage also includes such unscheduled personal property while elsewhere than on the described premises, anywhere in the world:

1. owned or used by an Insured; or
2. at the option of the Named Insured,
 - a. owned by a guest while in a residence occupied by an Insured; or
 - b. owned by a residence employee while actually engaged in the service of an Insured and while such property is in the physical custody of such residence employee or in a residence occupied by an Insured;
3. but the limit of this Company's liability for the unscheduled personal property away from the premises shall be an additional amount of insurance equal to 10% of the amount specified for Coverage C, in no event less than \$1,000.

This coverage excludes:

1. animals, birds or fish;
2. motorized vehicles, except such vehicles pertaining to the service

of the premises and not licensed for road use;

3. aircraft;
4. property of roomers and boarders not related to the Insured;
5. property carried or held as samples or for sale or for delivery after sale;
6. property rented or held for rental to others by the Insured, except property contained in that portion of the described premises customarily occupied exclusively by the Insured and occasionally rented to others or property of the Insured in that portion of the described dwelling occupied by roomers or boarders;
7. business property while away from the described premises; or
8. any device or instrument for the recording, reproduction or recording and reproduction of sound which may be operated by power from the electrical system of a motor vehicle, or any tape, wire, record disc or other medium for use with any such device or instrument while any of said property is in or upon a motor vehicle; or
9. property which is separately described and specifically insured in whole or in part by this or any other insurance.
10. loss by theft of personal property while away from the described premises unless coverage is endorsed hereon.

COVERAGE D — ADDITIONAL LIVING EXPENSE

If a property loss covered under this policy renders the premises untenable, this policy covers the necessary increase in living expense incurred by the Named Insured to continue as nearly as practicable the normal standard of living of the Named Insured's household for not exceeding the period of time required:

1. to repair or replace such damaged or destroyed property as soon as possible; or
2. for the Named Insured's household to become settled in permanent quarters, whichever is less.

This coverage also includes:

1. the fair rental value of any portion of the described dwelling or appurtenant structures covered under this policy, as furnished or equipped by the Named Insured, which is rented or held for rental by the Named Insured. The fair rental value shall not include charges and expenses that do not continue during the period of untenantability. Coverage shall be limited to the period of time required to restore, as soon as possible, the rented portion to the same tenantable condition;
2. the period of time, not exceeding two weeks, while access to the premises is prohibited by order of civil authority, as a direct result of damage to neighboring premises by a peril insured against.

The periods described above shall not be limited by the expiration of this policy.

This coverage excludes expense due to cancellation of any lease, or any written or oral agreement.

SUPPLEMENTARY COVERAGES

The following supplementary coverages shall not increase the applicable limit of liability under this policy:

1. Automatic Removal: If, during the term of this policy, the Named Insured removes unscheduled personal property covered under Coverage C from the premises to another location within the Continental United States, the State of Hawaii or the Commonwealth of Puerto Rico to be occupied as his principal residence, the limit of liability for Coverage C shall apply at each location in the proportion that the value of each location bears to the total value of all such property covered under

Coverage C.

Property in transit shall be subject to the limit of liability for unscheduled personal property away from the premises. This coverage shall apply only for a period of 30 days from the date removal commences and shall then cease.

2. Debris Removal: This policy covers expenses incurred in the removal of all debris of the property covered hereunder, occasioned by loss thereto for which coverage is afforded.

DEDUCTIBLE

Loss Deductible Clause: With respect to loss covered under this policy, this Company shall be liable only when such loss in each occurrence exceeds \$50. When loss is between \$50 and \$500 this Company shall

be liable for 11% of loss in excess of \$50 and when loss is \$500 or more, this loss deductible clause shall not apply. This loss deductible clause shall not apply to Coverage D—Additional Living Expense.

PERILS INSURED AGAINST

This policy insures against direct loss to the property covered by the following perils as defined and limited herein:

1. Fire or Lightning.
2. Removal, meaning direct loss by removal of the property covered hereunder from premises endangered by the perils insured against. The applicable limit of liability, had the property not been removed,

applies pro rata for 30 days at each proper place to which any of the property shall necessarily be removed for preservation from or for repair of damages caused by the perils insured against.

3. Windstorm or Hail, excluding loss:
 - a. caused directly or indirectly by frost or cold weather or ice (other than hail), snow or sleet, all whether driven by wind or not;

(OVER)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JAMES HEALY

b. to the interior of the building, or the property covered therein caused by rain, snow, sand or dust, all whether driven by wind or not, unless the building covered or containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then this Company shall be liable for loss to the interior of the building or the property covered therein as may be caused by rain, snow, sand or dust, entering the building through openings in the roof or walls made by direct action of wind or hail; or c. to watercraft (except rowboats and canoes on premises) including their trailers, furnishings, equipment and outboard motors while such property is not inside fully enclosed buildings.

4. Explosion.

5. Riot or Civil Commotion, including direct loss from pillage and looting occurring during and at the immediate place of a riot or civil commotion.

6. Aircraft, including self-propelled missiles and spacecraft.

7. Vehicles, but excluding loss to fences, driveways and walks caused by any vehicle owned or operated by any occupant of the premises.

8. Sudden and accidental damage from smoke, other than smoke from agricultural smudging or industrial operations.

9. Vandalism or Malicious Mischief, meaning only the wilful and malicious damage to or destruction of the property covered, but excluding loss if the described dwelling had been vacant beyond a period of 30 consecutive days immediately preceding the loss.

10. Breakage of glass constituting a part of the building covered hereunder, including glass in storm doors and storm windows, but excluding loss if the building covered had been vacant beyond a period of 30 consecutive days, immediately preceding the loss.

11. Theft, meaning any act of stealing or attempt thereat, including loss of property from a known place under circumstances when a probability of theft exists.

Unscheduled personal property contained in any bank, trust or safe deposit company, public warehouse or occupied dwelling not owned or occupied by or rented to an Insured in which the property covered has been placed for safekeeping shall be considered as being on the described premises.

Upon knowledge of loss under this peril or of an occurrence which may give rise to a claim for such loss, the Insured shall give immediate notice to this Company or its authorized agents and also to the police.

a. General Theft Exclusions:

This policy does not apply to loss:

- (1) if committed by an Insured;
- (2) in or to a dwelling under construction or of materials or supplies therefor until completed and occupied;
- (3) arising out of or resulting from the theft of any credit card or loss by forgery or alterations of any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain in money; or
- (4) of a precious or semi-precious stone from its setting;
- (5) of unscheduled personal property while away from the described premises unless coverage is endorsed hereon.

b. Theft Exclusions applicable while the described dwelling is rented to others:

This policy does not apply to loss from the described dwelling while the portion of the described dwelling customarily occupied exclusively by an Insured is rented to others:

- (1) of money, bullion, numismatic property or bank notes;

(2) of securities, accounts, bills, deeds, evidences of debt, letters of credit, notes other than bank notes, passports, railroad and other tickets or stamps, including philatelic property;

(3) of jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones; articles of gold and platinum; or any article of fur or article containing fur which represents its principal value;

(4) caused by a tenant, his employees or members of his household while renting the portion of the described dwelling customarily occupied exclusively by an Insured.

12. Falling objects, but excluding loss to:

a. the interior of the building or the property covered therein, caused by falling objects unless the building covered or containing the property covered shall first sustain an actual damage to the exterior of the roof or walls by the falling object; and

b. outdoor equipment, awnings and fences.

13. Weight of ice, snow or sleet which results in physical damage to the building covered or to property contained in a building and then only if the weight of ice, snow or sleet results in physical damage to such building, but excluding loss to:

a. outdoor equipment, awnings and fences; and

b. fences, pavements, patios, swimming pools, foundations, retaining walls, bulkheads, piers, wharves or docks when such loss is caused by freezing, thawing or by the pressure or weight of ice or water whether driven by wind or not.

14. Collapse of buildings or any part thereof, but excluding loss to outdoor equipment, awnings, fences, pavements, patios, swimming pools, underground pipes, flues, drains, cesspools and septic tanks, foundations, retaining walls, bulkheads, piers, wharves, or docks, all except as the direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

15. Sudden and accidental tearing asunder, cracking, burning or bulging of a steam or hot water heating system or of appliances for heating water, but not including loss caused by or resulting from freezing.

16. Accidental discharge or overflow of water or steam from within a plumbing, heating or air conditioning system or from within a domestic appliance, including the cost of tearing out and replacing any part of the building covered necessary to effect repairs to the system or appliance from which the water or steam escapes, but excluding loss:

- a. to the building caused by continuous or repeated seepage or leakage over a period of weeks, months or years;
- b. if the building covered had been vacant beyond a period of 30 consecutive days immediately preceding the loss;
- c. to the system or appliance from which the water or steam escapes; or
- d. caused by or resulting from freezing.

17. Freezing of plumbing, heating and air conditioning systems and domestic appliances, but excluding loss caused by and resulting from freezing while the building covered is vacant or unoccupied, unless the Insured shall have exercised due diligence with respect to maintaining heat in the building, or unless the plumbing and heating systems and domestic appliances had been drained and the water supply shut off during such vacancy or unoccupancy.

18. Sudden and accidental injury from electrical currents artificially generated to electrical appliances, devices, fixtures and wiring, except tubes, transistors and similar electronic components.

ADDITIONAL EXCLUSIONS

This policy does not insure against loss:

1. occasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair, or demolition of building(s) or structure(s) unless such liability is otherwise specifically assumed by endorsement hereon;

2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting, unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss;

3. caused by, resulting from, contributed to or aggravated by any of the following:

- a. flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;

b. water which backs up through sewers or drains; or

c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss, but these exclusions do not apply to loss by theft;

4. caused by or resulting from power, heating or cooling failure, unless such failure results from physical damage to power, heating or cooling equipment situated on the premises, caused by a peril insured against.

ADDITIONAL CONDITIONS

1. Replacement cost — Coverages A and B: This condition shall be applicable only to a building structure covered hereunder, but excluding out-

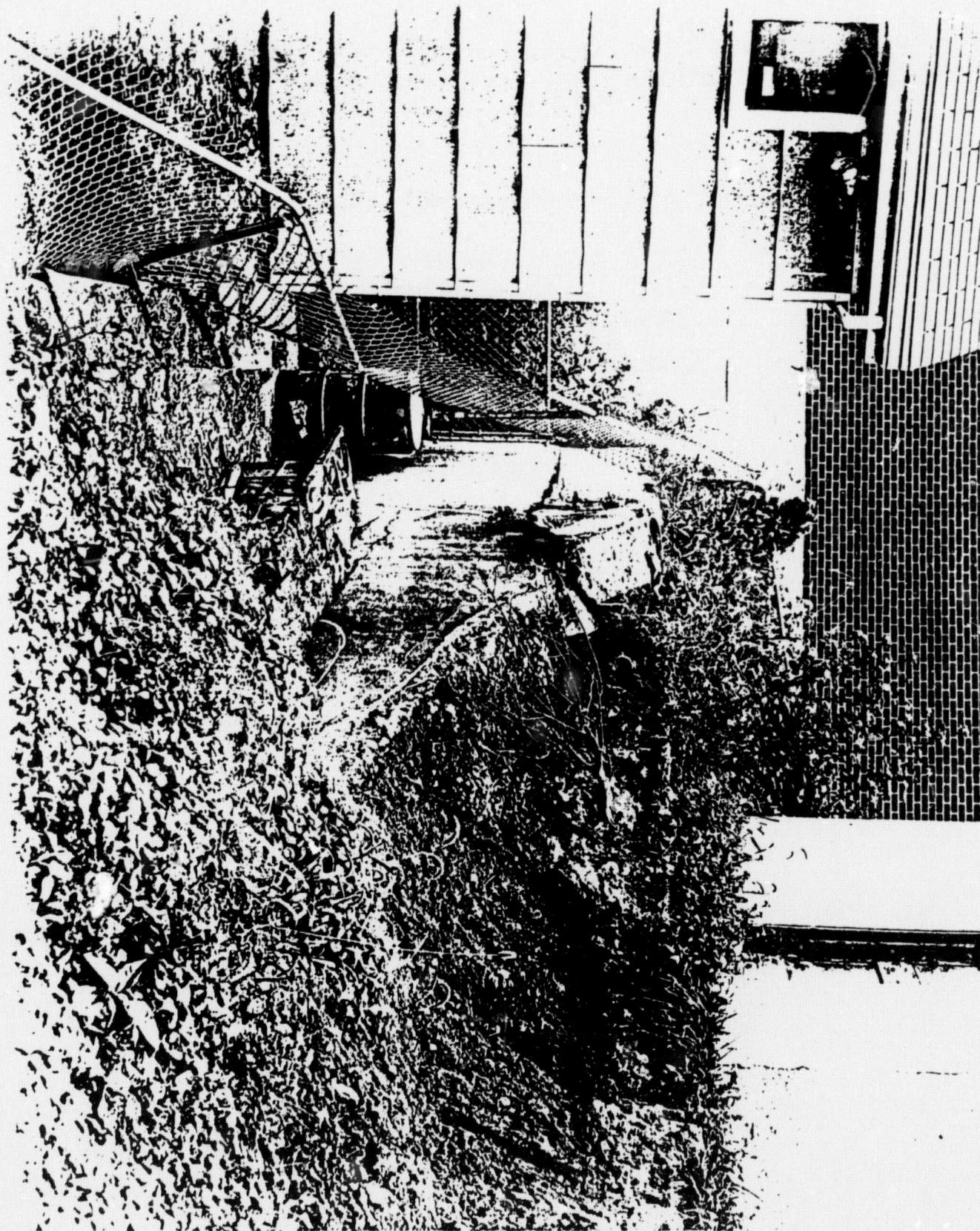
door radio and television antennas and aerials, carpeting, awnings, domestic appliances and outdoor equipment, all whether permanently

25a

EXHIBIT B-1, ANNEXED TO AFFIDAVIT OF JAMES HEALY.

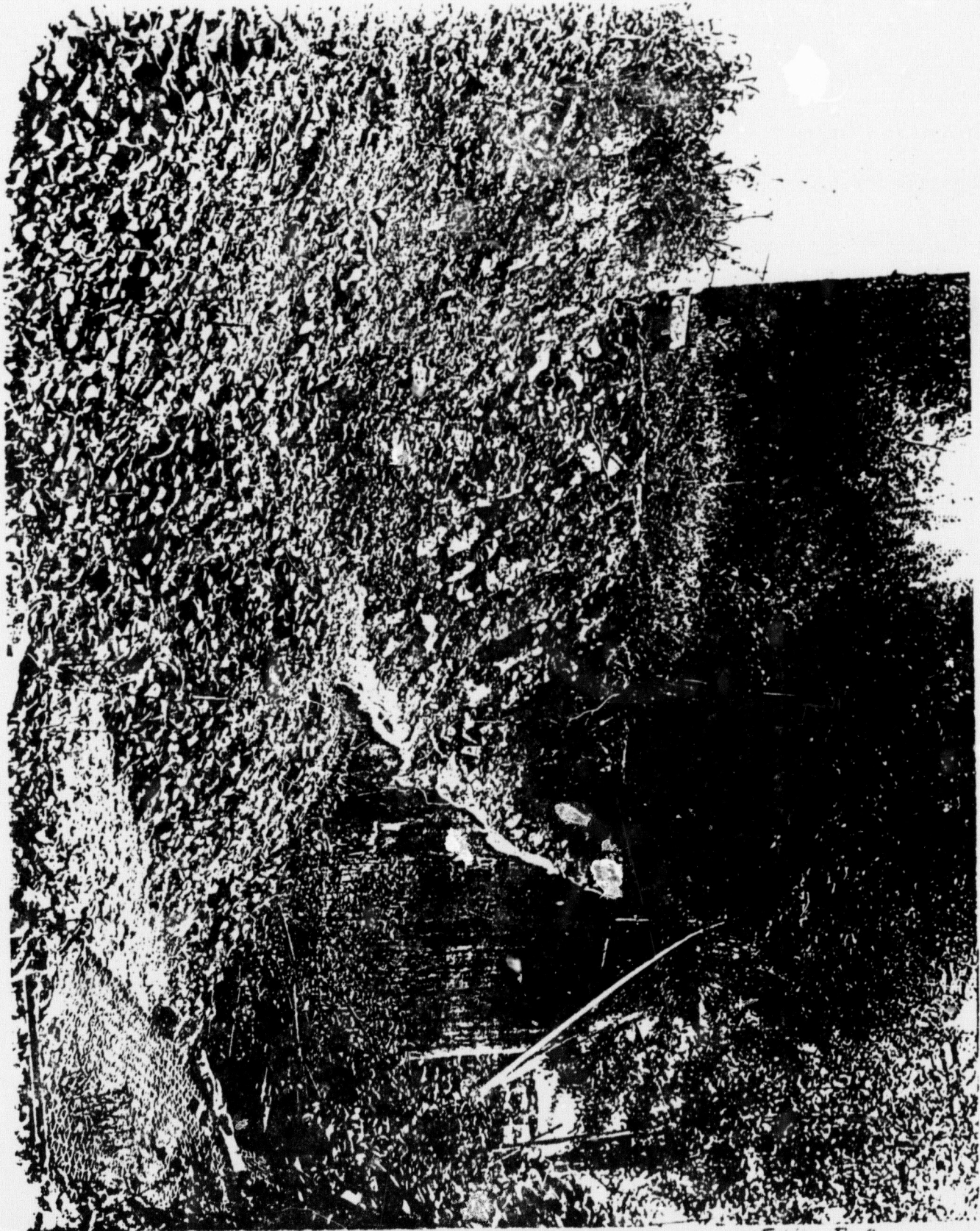


EXHIBIT B-2, ANNEXED TO AFFIDAVIT OF JAMES HEALY.



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EXHIBIT B-3, ANNEXED TO AFFIDAVIT OF JAMES HEALY.



AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

Index No. 76 C 765

ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs,

AFFIDAVIT IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant

----- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

MAX ANDER, being duly sworn, deposes and says:

I am the attorney for plaintiffs herein and am familiar with all the facts and circumstances set forth below, and submit this affidavit in opposition to defendant's motion for summary judgment.

It is axiomatic that a motion for summary judgment must be denied where there are triable issues, mixed questions of law and fact, or where there is doubt and ambiguity as to the meaning of the language utilized by the insurance company with respect to the policy involved. Hence on that basis alone, the motion for summary judgment must be denied to defendant, since it has not presented to the Court incontrovertible proofs as to the meaning of such vital language as "collapse" and "earth movement" so as to remove any and all doubt that the above definitions and their exclusionary provisions fully, completely and utterly deprive the plaintiffs of their right to a trial by their peers.

AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION

It is so basic as to now constitute a truism that in interpreting insurance contracts, particularly involving those of a non-business nature, words are to be given their customary and normal meaning as laymen understand them, and not as to how insurance companies interpret them according to their ultimate interests. The insured can only succeed to judgment if the provisions it has prepared are unambiguous and can only have the sole construction which it, the insurance company, states to be the case. If the language of the insurance contract is ambiguous or can be interpreted differently within reason, the construction is for the jury and furthermore the ambiguity is to be resolved against the company which prepared the policy and in favor of the insured. On those basic, well-established tenets of Insurance Law, the motion for summary judgment herein should be summarily denied. In fact, it may very well be that summary judgment herein should be granted in favor of plaintiffs since, to repeat, any ambiguities are to be resolved against the defendant insurance company which prepared the policy. However, I would prefer to be consistent in light of the law and let the issues herein be decided by a jury as demanded.

The divergence or conflicts in construction and interpretation as to terminology in cases dealing with exact or comparable policies to that in the case at bar only too vividly

AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION

point up the ambiguous nature or standard of the Home Owners' policy with so-called "broad provisions" which thus require ~~interpretation~~ by the triers of the facts, unless we are to falsely accuse our state and federal courts in conflict to be egregiously engaged in acting primarily as a debating society quibbling contentiously over unambiguous word^d policies.

It is noteworthy to consider that the defendant is relying on the report of Professor O'Connell, where it is manifest that Professor O'Connell's report of November 17, 1975 and his present affidavit clearly establish that the nature and extent of the damage were such as to clearly impel payment under the insurance policy and not the contrary. As set forth in the affidavit of plaintiff ALBERT L. BAILEY, JR., the defendant has failed to produce the existing report of its own engineer, leaving itself fatally ~~open~~^{open} to the inference that if the defendant had a favorable report or affidavit to submit from its own engineer under its control and fails to produce such evidence, that an inference is permissible that such evident would have been in favor of the position of plaintiff and not to the position of defendant and certainly as to the motion for summary judgment herein.

Any objective study of the law with respect to such terminology as "collapse" and "earth movement" and with respect to the exclusionary clauses would adduce a reasonable inference and honest conclusion favorable to the plaintiffs herein.

AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION

The term "collapse" as it is understood by laymen would signify that that term does not necessarily mean to fall in or to fall together but can as readily mean a pulling away of the foundation or walls and other supports as in the case at bar, so as to materially impair the function of the building proper and to render it unfit for habitation. If the house, as in the case at bar, is unusable and uninhabitable, it can reasonably constitute a collapse as to such building. Under ^{any} reckoning, the roots of the ambiguity as to the meaning of "collapse" would make the meaning of the word a jury question.

Certainly the defendant insurance company is aware of the rule of Noscitur A Sociis which is a rule of construction whereby the meaning of a word in a provision may be ascertained by a consideration of the company on which it is founded and the meaning of the words which are associated with it so that the understanding may be used in a cognate sense to express the same relationship and to give color and expression to each other. This cogent rule avoids vague, over-broad catch-all use of terminology employed more as a stratagem and ruse, by those companies to avoid payment where payment should be made, than as a means for clear understanding. The language of the insurance policy should be interpreted through the reading ^{by} of the eyes of the plain, average layman and determined by the Court upon "mixed considerations of logic, common sense, justice, policy and precedent." Pagan v. Goldberger, 51 A.D. 2d 508 (N.Y.2d Dept)

AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION

and Sheehan v. Novak (N.Y. Court of Appeals, decided July 15, 1976), New York Law Journal August 18, 1976.

With reference to the meaning and definition of "collapse", the defendant herein does not even deign to define it when it can be subject to conflicting interpretation. Even dictionaries in ordinary usage assign different meanings to the word "collapse."

The courts have long enunciated that if the insurer intended that the word "collapse" or any other phraseology had a certain definite indisputable meaning, it should have so defined it and stated it or spelled it out graphically in the contract of insurance. With respect to the terminology "earth movement", there are a plethora of cases to the effect that such phrase may have more than one meaning, and if the insurance company intended it to have a certain definite meaning (not merely abstract), it should have spelled it out. Furthermore, the terminology "earth movement" must be read in the light of the rule of *Noscitur A Sociis*. In applying said rule, the average person might very well connote such as an earthquake, volcanic eruption, landslide, etc., the very words alluded to in the exclusionary clauses in the policy.

With respect to Paragraph 3 of the policy under "ADDITIONAL EXCLUSIONS", the reference to water as bearing on the peril involved relates to a flood, water waves, overflow of streams of water which back up from sewers and drains, or water below the surface of the ground which exerts pressure on, or flows, seeps

AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION

or leaks through sidewalks, etc. Accordingly it can no more be fathomed that the collapse of the dwelling herein due to internal pressure is excluded by the policy than it can be said that the vegetable lettuce can be deemed a water product because it contains H^2O .

Other than a vague, desultory reference to the possibility that damage or destruction in the case at bar was referable to a settling, as stated by defendant's attorney in his moving affidavit, there is not one scintilla of proof or evidence that the occurrence herein was caused by settling. Such being the situation, the New York case on which the defendant insurance company so heavily relies, is of no application or significance. I shall have occasion to discuss in great detail the nonapplicability of the Graffeo case.

→ The rule of stare decisis is applicable in the case at bar since ~~it~~^{there} was a ruling by Mr. Justice Thomas Jones in the Supreme Court, Kings County, on November 20, 1975, that the building in the case at bar was dangerous and uninhabitable, and detrimental to human life and he as such ordered its demolition. See In the Matter of the Application of the City of New York vs. Unsafe Building & Structure, 26 Harb View Court.

AFFIDAVIT OF MAX ANDER IN OPPOSITION TO MOTION

With respect to the motion for summary judgment, the courts have consistently denied such applications in insurance cases not only where there are mixed questions of law and fact but where there are extraneous circumstances such as a ruling by another court of record, thus warranting denial of said motion for summary judgment and also where proof may be established on trial which cannot merely be put down on paper but must be heard and elaborated upon. It is clear that the defendant herein naturally does not want the meaning of the policy to be construed and interpreted by a jury, since as laymen they would be reading it (as intended by law) and that is according to the understanding of the average reasonable person coming from all walks of life.

The defendant is simply playing a shell game--the policyholder is covered so long as he pays his premiums and makes no claim, and not covered when he does have a claim.

WHEREFORE, it is respectfully requested that the motion for summary judgment be denied in toto and left to the discretion of the Court to grant summary judgment in favor of plaintiff, and for such other and further relief as may be just and proper in the premises.

MAX ANDER

Sworn to before me this
day of August, 1976

AFFIDAVIT OF ALBERT L. BAILEY, JR., IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Index No. 76 C 765

Plaintiffs,

AFFIDAVIT IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

ALBERT L. BAILEY, JR., being duly sworn, deposes and
says:

I am one of the plaintiffs herein and submit this
affidavit in opposition to the motion for summary judgment made
on behalf of the defendant herein. My wife Barbara J. Bailey,
and I owned a two-story dwelling at 26 Harbor View Court,
Richmond, Staten Island, for approximately four years. It was
used exclusively as a dwelling for ourselves and our four children
and was purchased through VA Financing.

Prior to July 13, 1975 we experienced absolutely no
difficulty with respect to the premises herein, including the
retaining and foundation walls. Our home was financed through
the First Federal Savings and Loan Association at 30 East 170th
Street, Bronx. When the house was purchased about four years ago,
the VA made what I believe to be a thorough examination of the
dwelling and foundations and, to the best of my knowledge, found
nothing wrong so as to involve any resultant collapse.

AFFIDAVIT OF ALBERT L. BAILEY, JR., IN OPPOSITION TO MOTION

I have read the affidavits of Professor O'Connell and my attorney MAX ANDER annexed hereto. I wish to state that Professor O'Connell has not taken a perfunctory superficial approach, so often the case with experts, but delved deeply and spent considerable time, some in my presence, examining the destroyed premises and discussing with governmental agencies the nature and extent of damage which occurred to our dwelling and walls. His concern I believe was focused not only on this action to recover on the insurance policy but with respect to the governmental agencies declaring the dwelling to be dangerous and uninhabitable, so that his interest was riveted and profound.

The debacle that arose on July 13, 1975 was so extensive and emergent that the Department of Buildings, Housing and Development Administration of the City of New York, the very next day on the 14th, ordered me to vacate the dwelling where I lived with my wife and four children, forthwith and summarily.

I attach hereto a copy of the peremptory vacate order which stated that the building was unsafe. Furthermore, Mr. Justice Thomas Jones, by precept issued November 20, 1975, ordered the demolition of the structure because of the dangers and threat to life and property arising from the dangerous state of the building.

I am awaiting a closing date with respect to obtaining a loan of more than \$50,000 from the Small Business Administration, Disaster Unit, of which more than \$30,000 will be expended in an attempt to salvage the dwelling in which we lived, so that

AFFIDAVIT OF ALBERT L. BAILEY, JR., IN OPPOSITION TO MOTION

we may return thereto when the dwelling is safe and habitable. At the present time we must live in a leased apartment while we continue to pay taxes on 26 Harbor View Court, in the hope that we may eventually we may be able to return thereto. The mandate to vacate our residence was so immediate that my wife and children had to move to my home state in Florida while I lived in miserable circumstances at a fleabitten hotel in New York near my place of work.

When I obtained the insurance policy involved herein, I was told that it was a multi-peril policy which provided extensive coverage. As a lay person, I saw nothing in that policy which excluded my being fairly compensated for the great destruction that has resulted in rendering our dwelling uninhabitable, unusable and dangerous. It is undeniable that its substantial integrity to exist as a building is nil and by all common sense non-existent.

I have read the affidavit of defendant's attorney JOHN M. SPEYER. To me it is totally self-serving in terms of mere conclusions which would benefit only his principal, the Hartford Insurance Company, and on the other hand, deprive us of what is due us under the policy, without any logical or sound reasoning. The weakness of defendant's position in making the motion for summary judgment to dismiss the complaint is most glaring in that it fails to include the affidavit of its own engineer who inspected the premises. Why has not the defendant submitted its

AFFIDAVIT OF ALBERT L. BAILEY, JR., IN OPPOSITION TO MOTION

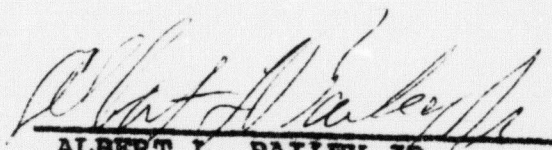
engineer's report, unless that report states information contrary to its interests or states matters which are patently absurd? The insurance company has turned and shifted its objections to paying me under the policy like a ^{WHIRLING DERVISH} ~~wheeling device~~ so as to lead to the inevitable conclusion that it simply wants to avoid fulfilling its contractual obligation and not because I am not legally entitled to be indemnified under the policy for which I have been paying premiums for a number of years.

At first, on the basis of rumors and hearsay, the insurance company disclaimed on the basis of lightning and then on the basis of hydrostatic pressure, and subsequently on the theory that the heavy storms during the evening of July 13 may have caused an overflow of sewage or water undermining the walls and foundations of my property. These defenses have been discarded because such proofs depended on available, objective, visible data which palpably the insurance company could not establish. Accordingly, the Hartford Insurance Co. now resorts to legalistic legerdeman and distortion of the terms of the policy in a futile effort to thwart recovery under the policy by resort to the device of gobbledeygook terminology. Having failed to demolish my ^{CLAIM} ~~clear~~ by real objective proof, the defendant herein has now resorted to a typical line of defense which is to split hairs as to language which it itself wrote into the contract and which unfortunately is not now to its satisfaction and sole benefit.

AFFIDAVIT OF ALBERT L. BAILEY, JR., IN OPPOSITION TO MOTION

I have been advised by my attorney, and I verily believe, that I have a good and meritorious cause of action herein.

WHEREFORE, it is respectfully requested that the motion to dismiss the summary judgment be denied.


ALBERT L. BAILEY, JR.

Sworn to before me this

23 day of August, 1976

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AFFIDAVIT OF DANIEL J. O'CONNELL IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs,

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant

----- X

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Index No. 76 C 765
(J.F.D.)

AFFIDAVIT IN OPPOSITION
TO MOTION FOR SUMMARY
JUDGMENT

DANIEL J. O'CONNELL, being duly sworn, deposes and says:

I am submitting this affidavit in opposition for summary judgment on the part of defendant herein. I am fully familiar with the structural damage involved at 26 Harbor View Court, Staten Island, New York, as I examined the premises, as indicated in my report of November 17, 1975; in addition, in connection with the application of the Housing and Development Administration, Department of Buildings, to have the entire premises declared unsafe and to cause total removal of plaintiffs and their family from said premises, I was in touch, and discussed with, the Borough Superintendent as to the unsafe and dangerous condition of the dwelling involved herein, resulting in the Supreme Court of the State of New York issuing a precept on November 20, 1975 to demolish the dwelling involved herein as unsafe, dangerous and detrimental to human life, etc.

AFFIDAVIT OF DANIEL J. O'CONNELL IN OPPOSITION TO MOTION

I have studied the multi-peril Home Owners broad form policy in the case herein and have read the motion papers for summary judgment. I am categorically of the opinion, based on my extensive engineering experience, that (a) there was a collapse of the dwelling; (b) that the collapse of said building, partial in nature, was not caused by exclusions covered in the policy, and (c) that the substantial damage involved was not due to any earth movement.

I have been a licensed professional engineer since 1940.

My education in the field is as follows:

Bachelor of Science

Master civil engineer since 1933

3 years post-graduate Civil and Mechanical Engineering, Columbia University

Taught engineering in Manhattan Collage from 1930 to 1954

Ass't. Professor and Engineer at Manhattan College in 1944

Lectured in Foundation and Design Reinforcement

Director of Soil Mechanics Laboratory and Material Testing Laboratory, Manhattan College

Consultant in Engineering for the City of New York and for the Port Authority

I am indeed honored that the defendant chose to use my report of November 17, 1975 rather than that of their own engineer in support of their application to dismiss the complaint, but I do

AFFIDAVIT OF DANIEL J. O'CONNELL IN OPPOSITION TO MOTION

not believe that my report in any way has assisted the defendant; I feel it is quite to the contrary.

My report of November 17, 1975 indicated that the retaining wall which collapsed on July 13, 1975, resulted in leaving only 20 feet standing while 60 feet of the wall collapsed. Thus 1/3th of that retaining wall gave way. The collapse of the retaining wall removed the pre-existing lateral support of the foundation wall and the wall on which it rested. I said in my report and I reiterate: "The loss of lateral support has rendered the rear foundation wall dangerous and totally unfit for its intended use ~~to~~ support the two-story and attic dwelling." The structural stability of the dwelling had been seriously impaired and indeed partial collapse of the dwelling had already occurred, since the foundation wall cracked and two large vertical cracks widened due to the loss of lateral support. The substantial integrity of the dwelling had been so adversely affected as to render it dangerous for habitation, and in my opinion, under such conditions, said dwelling has at least for all purposes partially collapsed. The partial collapse of said dwelling was due to internal pressure and expansion of soil in turn due to absorption of water and voids of the soil. The retaining wall was old but its weight ^{of soil and water} did not cause its collapse. There was no increase in the weight of the soil or water and all the ensuing collapse was not extraneous and occurred suddenly. There was no "earth movement" as there was

AFFIDAVIT OF DANIEL J. O'CONNELL IN OPPOSITION TO MOTION

no displacement of the center of gravity and the expansion and contraction involved did not represent any movement of soil which in the instance of the matter at bar remained in place.

In conclusion, the structural stability of the dwelling had been seriously impaired as a result of the collapse of the retaining wall on July 13, 1975, resulting in a partial collapse of the dwelling and not due to any so-called hydrostatic pressure resulting from flowing or impounded free water behind the wall but solely to the pressure as I have described above.

Daniel J. O'Connell

DANIEL J. O'CONNELL

Sworn to before me this

day of August, 1976

Notary Public
New York
County
Commission Expires March 30, 1978

REPLY AFFIDAVIT OF J. P. DUFFY IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -X
ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,
Plaintiffs

- against -

HARTFORD FIRE INSURANCE CO.,
Defendant.

:
:
Index no. 76 C 765
(J.F.D.)

:
:
REPLY AFFIDAVIT IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT

----- -X
STATE OF NEW YORK)
) CB.:
COUNTY OF NEW YORK)

J. P. DUFFY, being duly sworn, deposes and says:

1. I am resident Assistant Secretary of Hartford Fire Insurance Co. and am familiar with the Company's file concerning this claim. I submit this reply affidavit in support of defendant's motion for summary judgment.

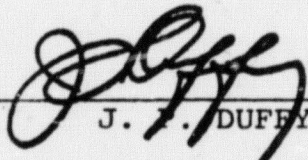
2. I have read the affidavit in opposition to this motion of plaintiff, sworn to August 23, 1976, in which Mr. Bailey states: "At first, on the basis of rumors and hearsay, the insurance company disclaimed on the basis of lightning...."

3. The fact is that plaintiff himself originally claimed that the loss was caused by lightning (copy of plaintiff's letter attached, Exhibit "A"). The reason for this was presumably that loss caused by lightning would have been covered, whereas a loss

REPLY AFFIDAVIT OF J. P. DUFFY IN SUPPORT OF MOTION

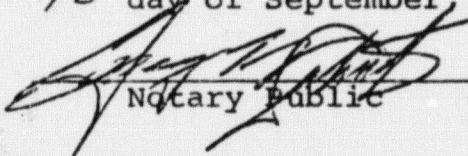
of the nature involved herein would not. Since lightning obviously had not caused the loss, this claim was not pressed and expansion of soil was substituted by plaintiff as the cause of the loss. In any event, it was the insured and not the Company which claimed the loss was caused by lightning.

4. I make this reply affidavit not because the issue of lightning raises any questions of fact but because plaintiff's statements show his attempt to twist the facts and greatly affect his credibility.


J. P. DUFFY

Sworn to before me this

13 day of September, 1976.


Notary Public

GEORGE T. ROBERTS
NOTARY PUBLIC, State of New York
No. 24-3309080
Qualified in Kings County
Term Expires March 30, 1977

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF J. P. DUFFY.

Albert L. Bailey Jr.
26 Harbor View Ct.
Staten Island, N. Y.
10301

July 20, 1975

The Hartford Insurance Co.
Hartford, Connecticut
Attn: Claims Department
Fire and Casualty Div.

Dear Sir,

On Sunday July 13, 1975 approximately 9am eastern daylight time, lightning struck a chain link fence which was embedded in a concrete retaining wall situated at the rear property line of my home. The wall and fence collapsed onto the adjoining property at 210 and 216 Stanley Ave. When the wall collapsed, the earth between the wall and the house also collapsed, thus undermining the rear foundation wall of my home. As a result of the incident there is imminent danger of the house sliding onto the adjacent houses at 210 and 216 Stanley Ave. Please see attached drawing with collapsed section of wall marked in red pencil.

The incident was witnessed by three of my children. They are Albert L. Bailey III aged 16, John J. Bailey aged 10, and Shannon LeAnne Bailey aged 6. The first report came from Shannon, who awakened my Wife. She said, "Mother we were struck by lightning". She then reiterated, "please wake up Mother, we were struck by lightning". Then John came into the bedroom and reported in the same manner. Then the oldest boy came rushing in and said there was a bright flash outside his bedroom window, which is directly above the wall. The people at 210 and 216 Stanley then called on the telephone and reported the wall was down.

I was awakened by the second plea from my Daughter and immediately investigated. I then reported the incident to the police department at the 120th precinct in St. George, who dispatched two officers to investigate. The police then reported the incident to the New York City Buildings Department, and the Department of Relocation.

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF J. P. DUFFY

On Monday July 14, the inspector from the Buildings Dept. made his investigation with two assistants and then issued the attached vacate order.

The investigator from the Department of Relocation came to our home and after questioning my Wife and I said, that he could do nothing except reinforce the Buildings inspectors order to vacate.

On Monday July 14, I moved my family to the Holiday Inn on Staten Island. This is the only hotel facility in the area. I have no relatives in the north that I could move in with temporarily.

Tuesday July 15, your agent and adjuster inspected the desaster, and said that their builders would make a report and then the claim would be considered. Thursday July 17, your adjuster, Mr. Perna, called me and said that the claim had been denied by Hartford because there was a possibility that static water pressure behind the wall had caused the collapse.

Thursday July 17, I received a "hazardous violation" against the property from the New York City Buildings Department ordering me to repair and restore within ten days or there would be criminal action taken. Copy inclosed.

I am writing to appeal to you to reinvestigate and reconsider your decision to deny the claim under the lightening perils clause. I am also asking defense under liability clause, because of the violation from the NYC Buildings Dept. and forth coming suits from the residents of 210 and 216 Stanley Ave.

Your prompt attention to this matter will be appreciated.

cc: 1st Federal Savings & Loan
Veteran's Administration

Respectfully

Albert L. Bailey Jr.
Albert L. Bailey Jr.

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

76-C-765

Plaintiffs,

MEMORANDUM
and
ORDER

- against -

HARTFORD FIRE INSURANCE CO.,

Defendant.

Appearances:

MAX ANDER, Esq., for plaintiffs

JOHN M. SPEYER, Esq. and MICHAEL E. GORELICK, Esq.
(Messrs. GREENHILL & SPEYER, of Counsel) for
defendant

DOOLING, D. J.

In this diversity suit, commenced in the Supreme Court, County of Richmond, on March 4, 1976, and removed to this Court, the plaintiff home owners seek to recover on the Home Owners Policy issued to them by defendant which for the period July 12, 1974 to July 12, 1977 insured them against specified losses. The plaintiffs contend that a loss covered by the policy occurred on or about July 13, 1975. The present motion for summary judgment has brought forward the undisputed

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

facts dispositive of the case, unless, as plaintiffs contend, questions of the interpretation of the language of the insurance policy require a jury determination.

Plaintiffs' private dwelling house in Staten Island is located on irregular ground. At the rear of the property and about five feet from the rear wall of plaintiffs' house ran a 90-foot long retaining wall. The retaining wall, of unreinforced concrete, stood nine feet high, was ninety feet long and a little over one foot thick. On July 13, 1975, sixty or seventy of the ninety feet of the retaining wall collapsed, removing the pre-existing lateral support of the foundation wall of the house and of the house wall resting on the foundation wall. The Department of Buildings of the New York City Housing Development Administration on the very next day directed plaintiffs and their four children to vacate the dwelling. The Department of Buildings later issued a "Notice of Unsafe Building and Structure, Order, Notice of Survey and Summons" which stated that

The above building is structurally unsafe due to collapse of ten feet high and fifty feet long section of concrete retaining wall at rear lot line which has left rear foundation wall without adequate support and subject to undermining and possible collapse.

The instrument directed plaintiffs to

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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. . . provide proper temporary shoring until
adequate permanent supports have been placed.

On November 20, 1975, the Supreme Court, Richmond County,
issued a precept authorizing an order of demolition unless the
owners obtained an authorization from the Department of
Buildings to perform the work necessary to make the structure
safe or to demolish the structure and then proceeded dili-
gently to comply with the authorization.

Plaintiffs promptly presented a claim against the
defendant under the policy of insurance, and on July 20, 1975,
plaintiff Albert Bailey wrote defendant attributing the col-
lapse of the retaining wall to lightning striking the chain
link fence embedded at the top of the retaining wall and
saying

When the wall collapsed, the earth between
the wall and the house also collapsed, thus
undermining the rear foundation wall of my
home. As a result of the incident there is
imminent danger of the house sliding onto
the adjacent houses

The letter states further that on July 17, 1975 defendant's
adjuster advised Mr. Bailey that the claim had been denied
by the insurer

. . . because there was a possibility that
static water pressure behind the wall had
caused the collapse.

It seems that there had been heavy rainfall during the evening

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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of July 13 but there is no suggestion that the volume of water was such as to wash the wall away or directly to cause the collapse as incident to the storm.

Photographs taken after the collapse of the retaining wall show that much of the earth behind the wall flowed outward when the wall gave way, greatly narrowing the five foot earth support that had stood between the retaining wall and the foundation wall of plaintiffs' house. The photographs show plaintiffs' house standing, but it is possible to see in at least one if not two of the photographs a vertical crack in the rear wall of the building.

Plaintiffs retained a consulting engineer

. . . in order to determine the cause of the sudden collapse of the retaining wall and the effect on the stability and structural condition of the foundation of the . . . residence. . . .

He rendered a report with respect to the structural damage at the building site on November 17, 1975. He described the wall and then noted that "the retaining wall provided necessary lateral stability for the foundation wall" of the house. After saying that the collapse of the wall removed the pre-existing lateral support of the foundation wall and the earth on which it rested, he said that,

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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The loss of lateral support has rendered the rear foundation wall dangerous and totally unfit for its intended use to support the 2-story and attic dwelling.

Then he said

The structural stability of the dwelling has been seriously impaired, and complete collapse on to the adjacent property below will occur when the supporting soil is eroded away sufficiently. Indeed, partial collapse of the dwelling has already occurred. The foundation wall has cracked, and two large vertical cracks are widening due to the loss of its lateral support.

Thus, the rear wall of the dwelling must be properly shored up immediately to prevent total and irreparable collapse.

In explaining how the collapse of the retaining wall occurred, the consulting engineer expressed the opinion that the wall had not toppled over from the weight of the soil against it, but had rather broken in bending along a plane approximately two feet above the foot of the wall. The force that bent the wall outward below the high ground in this way was the expansion of the soil brought about through the soil's retention of absorbed water. He expressed the view that the wall did not collapse because of the hydrostatic pressure of flowing or impounded free water behind the wall, but solely because of the pressure due to the expansion, through water absorption, of the silt and clay contained in the soil. The consulting

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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engineer's final conclusions were

5. The collapse of the retaining wall removed the pre-existing lateral support of the rear foundation wall of the 2-story dwelling, and has caused its partial collapse.
6. The loss of lateral support of the rear foundation wall has rendered it dangerous and totally unfit for its intended use.
7. The rear wall will surely collapse when the laterally unsupported soil on which it rests erodes sufficiently.
8. The rear wall must be properly shored up immediately to prevent collapse and irreparable damage to the dwelling.

The Home Owner's Policy (the form for use in metropolitan New York City) first describes the property and interests covered, then specifies the perils insured against (which in part contain exclusions), and finally states a set of additional exclusions.

"COVERAGE A-DWELLING" states that the policy covers the dwelling building, including additions in contact therewith, occupied principally as a private residence.

"COVERAGE B-APPURTENANT STRUCTURES" states that the policy covers structures (other than the dwelling and additions in contact with it) "appertaining to the premises and located thereon."

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

The perils insured against include fire and lightning and include as peril 14, the following:

Collapse of buildings or any part thereof, but excluding loss to outdoor equipment, awnings, fences, pavements, patios, swimming pools, underground pipes, flues, drains, cesspools and septic tanks, foundations, retaining walls, bulkheads, piers, wharves, or docks, all except as the direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinkage, bulging or expansion.

The "Additional Exclusions" include exclusions 2 and 3 which declare that the policy does not insure against loss:

2. caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, volcanic eruption, landslide, mudflow, earth sinking, rising or shifting; unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss;

3. caused by, resulting from, contributed to or aggravated by any of the following:

a. flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;

b. water which backs up through sewers or drains; or

c. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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other floors or through doors, windows or
any other openings in such sidewalks,
driveways, foundations, walls or floors;

unless loss by fire or explosion ensues, and
this Company shall then be liable only for
such ensuing loss, but these exclusions do
not apply to loss by theft;

It is not suggested that the retaining wall itself
was a covered structure within the policy. Manifestly the
retaining wall collapsed, and the earth support between the
retaining wall and the building can be said to have, in large
part, collapsed. The question discussed has been, Can the
building or any part of it be said to have collapsed within
the meaning of the 14th of the perils insured against? Second-
arily, it has been contended that even if what occurred could
be treated as a collapse of the building or of a part of the
building it would be excluded because of the second or third
of the Additional Exclusions from risk.

The "earth movement" exclusion cannot be lightly
put aside. It includes not only earthquakes or volcanic
eruptions but also landslides, mudflow, and earth sinking,
rising or shifting, and the introductory words are "any earth
movement." The photographs demonstrate, and plaintiffs'
consulting engineer's opinion makes it very clear, that the
direct cause of the injury to the rear wall of plaintiffs'

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DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

dwelling was the loss of lateral support due to the sudden removal of the earth between the rear wall of the building and the retaining wall. On a very modest scale as compared with earthquakes and volcanic eruptions, a landslide is present. If the words "any earth movement, including but not limited to . . . landslide" are given their exact meaning, the cause of the damage to the building in the present case was an excluded cause. Cantanucci v. Reliance Ins. Co., 3rd Dept. 1973, 43 App.Div.2d 622, 349 N.Y.S.2d 187, aff'd, 19 , 35 N.Y.2d 890, is not opposed. That case was concerned with the sub-surface water exclusion primarily and with the coverage against accidental discharge of water from within a plumbing system; the reference to the earth movement exclusion recognizes the obvious fact that the earth movement there ~~was~~ involved as the agency and consequence, and not the cause, of the loss sustained from a covered peril.

The sub-surface water exclusion does not appear to be involved. While ^{the} words of the exclusion are very inclusive, the whole clause appears to deal with water which produces its effect by its weight, or by its erosion of earth or structure, or which otherwise produces its loss and damage because of its effect as flowing water, and not because of its secondary effect, however damaging, in causing an earth expansion which,

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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in turn, exerts destructive pressure, as the consulting engineer found was the case in the present instance.

The question most discussed, however, has been whether the damage done to the house itself can be regarded as a collapse. The words "collapse of buildings or any part thereof . . . Collapse does not include settling, cracking, shrinkage, bulging or expansion" in their common meaning exclude damage described as

The foundation wall was cracked, and two large vertical cracks are widening due to the loss of its lateral support.

In common contemporary usage, as applied to physical structures, the word "collapse" connotes both suddenness and totality and that is the view that was taken in Weiss v. Home Ins. Co., 3rd Dept. 1959, 9 App.Div.2d 598, 189 N.Y.S.2d 355. In Graffeo v. United States Fidelity & Guaranty Co., 2d Dept. 1964, 20 App.Div.2d 643, 246 N.Y.S.2d 258, the Court adverted to and rejected the interpretation of the term collapse which tended to equate it with a deprivation of useful value, and, again, took the view that "collapse" connotes suddenness and totality. Both cases can be distinguished on the facts. They are not the present case. But there exists a plain division between courts in their approach to the word "collapse" and the two cases are clear on the choice which the Courts of this

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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State have made unless Nixon v. Liberty Mutual Ins. Co., 4th Dept., 16 App.Div.2d 863, 228 N.Y.S.2d 450, indicates a different approach. The result in the Nixon case is difficult to understand, but plaintiff has pointed out that in the Supreme Court the case was apparently put on the ground that it was not necessary for a "collapse" to affect an entire building, indicating that the Court considered that something at least had collapsed, and, presumably, collapsed in the sense in which that expression had been defined in the earlier Weiss case. Nixon was decided by a divided Court, and so far as appears was not appealed and has not since been cited.

Plaintiff relies heavily on Government Employees Insurance Co. v. DeJames, 1970, 256 Md. 717, 261 A.2d 747, in which the Court reviews the whole field thoroughly. In that case the home owners found that there was a horizontal crack at the first course of cinder blocks on the basement floor, a crack that extended two-thirds the length of the rear wall. The crack was such that the consulting engineer was able to pass his hand through the crack to the earth on the outside of the basement wall. In the judgment of the engineer it was correct to say that the wall had failed, that is, that it could no longer sustain the load which it was designed to sustain, and was, from the engineering point of view, unsafe.

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

- 21 -
Indeed, the building of the house had shored the wall up with timber supports and put in a wooden framework to support the first floor joists. The building had not fallen in upon itself, and the case does not show what occasioned the mishap to the wall. There was, however, evidence that the home owner had heard a very loud thud like a distant explosion, and the time of the noise apparently was the time when the floor joist and wall supports were installed. The Court held that the collapse clause in the policy covered the event. The language of the policy was "collapse (not settling, cracking, shrinkage, bulging or expansion) of building(s) or any part thereof," and there was an exclusion for loss "caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, landslide, mud flow, earth sinking, rising or shifting." The Court traced the history of the word collapse, particularly as a noun, noting that it was first used in noun form in physiology and medicine (e.g., collapse of a lunge or a blood vessel), that it is used in an abstract or metaphorical sense (e.g., the collapse of a theory), and finally that it is used in describing occurrences to physical structures. The last usage the Court suggested, was primarily applicable to the verb form of the word rather than its noun form - a restriction not countenanced by Webster's

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
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Third New National Dictionary (1961) 443 col. 3. The Court noted that the parties before it were in agreement that the majority view was that the word when used as a noun in an insurance contract meant a "complete change in structure, an impairment of structural integrity, or loss of distinctive character or usefulness as a building." But the Court adopted the minority view to the extent of saying that the policy was ambiguous and it was therefore appropriate to give the case to the jury - along with, apparently, a copy of Webster's Third International Dictionary (1941) page 443. The Maryland Court cited both Graffeo and Weiss as part of the majority view from which it chose to depart. The other cases discussed by plaintiffs reflect the view of the DeJames case, a view that it recognized as one that does not prevail in New York.

There is no gainsaying the plaintiffs' serious loss. Plaintiffs say that they may have to spend as much as \$30,000 to restore the building to a safe condition. But the difficulty is that plaintiff was not insured against the collapse of the retaining wall. Had plaintiffs' insurance covered them against any loss or damage to the building from the collapse of the retaining wall, their case would be complete, but that is not the insurance contract that was made. Defendant is entitled to the benefit of its contract, and its contract does

MEMORANDUM AND ORDER BY DOOLING, D. J., GRANTING
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

not cover the risk that eventuated here and the agency producing the loss was one excluded from the risks covered.

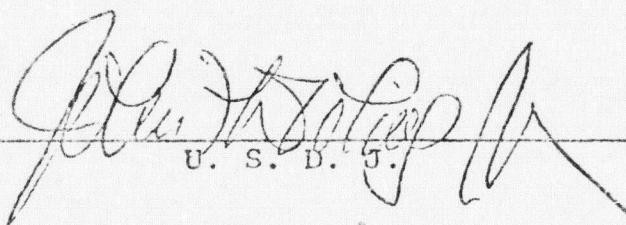
Plaintiffs argue that in any event there is that ambiguity here which would authorize the submission of the case to a jury for determination. That is not the case. There is no dispute about the controlling facts and there is no ambiguity in the language of the contract when it is applied to the events which it is agreed did occur.

It is accordingly,

ORDERED that defendant's motion for summary judgment is granted and the Clerk is directed to enter judgment that plaintiffs take nothing and that the action is dismissed on the merits with costs as taxed by the Clerk.

Brooklyn, New York

October 29, 1976


U. S. D. J.

JUDGMENT DISMISSING COMPLAINT APPEALED FROM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALBERT L. BAILEY, JR. and
BARBARA J. BAILEY,

Plaintiffs,

- against -

HARTFORD FIRE INSURANCE CO.,

Defendant.

JUDGMENT

76 **FILED**
CLERK'S OFFICE
U.S. DISTRICT COURT ED. NY

★ NOV 1 1976 ★

TIME AM
P.M.

A memorandum and order of Honorable John F. Dooling, United States District Judge, having been filed on October 29, 1976, granting the defendant's motion for summary judgment and directing the Clerk to enter judgment that plaintiffs take nothing and that the action is dismissed on the merits with costs as taxed by the Clerk, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendant and that the defendant's motion for summary judgment is granted and the action is dismissed on the merits with costs as taxed by the Clerk.

Dated: Brooklyn, New York
October 29, 1976

Leins Angel

Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

ALBERT L. BAILEY, JR. AND
BARBARA J. BAILEY,

76-C-765

Plaintiff-Appellants,

-against-

HARTFORD FIRE INSURANCE CO.,

Defendant-Respondent

NOTICE OF APPEAL

ACTION TO RECOVER ON
HOME OWNERS' INSURANCE
POLICY

----- X

NOTICE IS HEREBY GIVEN that plaintiffs hereby
appeal to the United States Court of Appeals for the
Second Circuit from the final judgment entered in this
action on the 29th day of October, 1976.

Dated: New York, New York

November 17, 1976

MAX ANDER
Attorney for Plaintiff-Appellants
Office and P O Address
565 Fifth Avenue
New York, N.Y. 10017
212-CX 7-4150

Service of ^{two} ~~three~~ copies of
the within is
hereby admitted this 17th day
of January, 1977

Quarles & Geyer
Attorney for defendants